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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>ALFREDO GODINEZ,<br><br>Defendant and Appellant. | B148995<br><br>(Los Angeles County<br>Super. Ct. No. KA040360) |

APPEAL from the judgment of the Superior Court of Los Angeles County. Clifton L. Allen, Judge. Affirmed.

David L. Bernstein, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Steven D. Matthews and Xiomara Costello, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted appellant Alfredo Godinez of theft from the person in violation of Penal Code section 484 (count 1),[1] and first degree residential burglary in violation of section 459 (count 2). With respect to count 2, the jury found true the allegation that appellant had committed the offenses for the benefit of, at the direction of, and in association with, a criminal street gang, with the specific intent to promote, further, and assist criminal conduct by gang members.

The trial court sentenced appellant to nine years in state prison. The sentence consisted of the upper term of six years on count 2 and the upper term of three years for the gang enhancement. The court sentenced appellant to a concurrent term of six months on count 1.

Appellant contends on appeal that: (1) the trial court's failure to consider relevant circumstances in mitigation, coupled with its finding of only a single circumstance in aggravation, mandates a new sentencing hearing for appellant, and (2) trial counsel rendered constitutionally ineffective assistance when he failed to request a statement of reasons for the trial court's imposition of the upper term on the gang enhancement.

**FACTS**

Yvonne L., her four children, and her boyfriend, M.R., lived on Dodson Street in El Monte in May 1998. The area was inhabited by many members of the El Monte Flores criminal street gang. Appellant, a member of El Monte Flores, also lived in the neighborhood. One day M.R. saw a man jumping over his fence into his yard. He identified appellant as that man in court. Appellant told him he was sorry for disturbing the peace, but he was being chased by a police helicopter. Appellant then jumped out of M.R.'s yard.

At one point, Yvonne L. had an angry conversation with the mother of appellant's codefendant, Montoya, about a name-calling incident between Yvonne L.'s

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[1] All further statutory references are to the Penal Code unless otherwise stated.

daughter and Montoya's little sister. Montoya's family lived across the street from Yvonne L. Yvonne L.'s boyfriend, M.R., had his own unpleasant experiences in the neighborhood. He had an encounter with several young men from the neighborhood, one of whom was Carlos Aranda. The men asked M.R. for a cigarette and asked him "what do you do." They grabbed the bicycle M.R. was riding, and he struggled to keep it. He got away and told Yvonne L. what happened. Yvonne L. talked to Carlos Aranda's mother, saying she would call the police if it happened again.

On the day of the offenses in question, M.R. left home for a doctor's appointment. Yvonne L. went outside with M.R. and saw him get on his bicycle and begin to pedal away. Appellant called out to M.R., and M.R. stopped his bicycle next to appellant. Appellant told M.R. again that he was sorry about jumping the fence. Then several other men joined appellant. These included Carlos Aranda, a youth named Twisty, and appellant's codefendants Montoya and Rivera. Appellant grabbed M.R.'s bike by the handlebars. The men closed in on M.R. Montoya asked M.R. where he was from and what he was called. M.R. said he was from nowhere and was not called anything. Montoya swung at M.R. and hit him on the left cheek. M.R. ran back to his house and called 911.

Yvonne L. followed M.R. inside, closing the door behind her. She took the telephone from M.R. and said the police must hurry because there were gang members outside who were trying to beat up M.R. M.R. locked the deadbolt and pushed a console television set in front of the door. He heard the men outside yelling that they were El Monte Flores and they were going to burn down the house. They began to kick the wooden door. The door began to shake and then broke. Montoya entered. Two or three of the other four men in the group put a foot through the door into Yvonne L.'s house. Montoya told them to get out. M.R. had a baseball bat in his hand for protection. Montoya told Yvonne L. and M.R. that they were messing around with the wrong family. Montoya said he was going to kill them and the kids and that his homeboys were going to burn down the house.

A neighbor came by and told Montoya to get out of Yvonne L.'s house because the police were coming. Montoya told Yvonne L. to tell the police that he was their friend and that nothing had happened. He threatened that his uncle was coming out of jail and would "take care of" them.

When the police arrived, Yvonne L. and M.R. left the house. M.R. was arrested and later released. Montoya left the house but had to be pepper-sprayed because he resisted the police.

Aranda and Twisty were arrested in their homes. M.R. saw appellant being arrested in the street, and M.R.'s bicycle was on the street next to him.

One of the officers who responded to the call to Dodson Street was Officer Eduardo Nafarrete. The first person he saw was on a bicycle, riding eastbound on Dodson. The person was identified as appellant. Nafarrete got out of his police car and detained appellant at gunpoint. He had never seen appellant before, but appellant appeared to be a gang member, and the call had related to the El Monte Flores gang.

## DISCUSSION

### *I. Allegations Regarding Sentencing*

Appellant argues that, because the trial court found only a single circumstance in aggravation and refused to consider two undisputed circumstances in mitigation, the court erred in sentencing him to the high terms. Moreover, appellant asserts, the error cannot be considered harmless. Appellant claims he is entitled to a new sentencing hearing where his mitigating circumstances are expressly considered and the trial court's unsupported allegation that one of appellant's misdemeanor priors was a "serious robbery crime" is excluded from consideration.

The record reveals that, at sentencing, trial counsel argued to the court that appellant had been polite and apologetic to the victims prior to the confrontation instigated by codefendant Montoya. Counsel also pointed out that appellant had no adult criminal record. The court replied that appellant had three misdemeanor juvenile cases, and "one was a serious felony that was reduced to a misdemeanor." Counsel replied: "That's correct. It was in October of 1993. One petition in October of 1993;

petition in November of 1993. And then in December of 1994 there was a petition which was sustained for a 484; it was reduced to a 484, Your Honor. [¶] Your Honor, his encounters as a juvenile were not that serious, Your Honor. There were sustained petitions, but they were not serious petitions. [¶] Your Honor, his first and only felony conviction as an adult is basically is that the testimony is he put half a foot inside Yvonne L. and M.R.'s door, one-half a foot, after Mr. Montoya had entered the premises there on Dotson . . . Street, and he immediately withdrew that foot, Your Honor."

Counsel went on to say that appellant was not tied to any of the threats or intimidation and that the current offenses constituted his only adult "scrape" with the law. Counsel argued that the conduct of appellant putting his foot in the door and picking up M.R.'s bicycle afterwards warranted nothing greater than the low term. Although counsel acknowledged that appellant had admitted being a gang member to police, appellant had no gang-related convictions and only three or four sporadic encounters with the El Monte police. In the current instance appellant was merely at the scene and made poor decisions. Counsel added that appellant had been steadily employed as an itinerant worker and was completing his GED.

In response, the prosecution attributed appellant's lack of prior convictions to the fact that the El Monte Flores gang was good at intimidating witnesses. The prosecutor added that appellant had been able to commit offenses as an adult within a short period of time of becoming an adult. The prosecution asked for the mid-term sentence.

After listening to rebuttal from defense counsel, the court stated: "Okay. The court presided over the trial, of course, heard the evidence, and I read the probation reports in this case, and for all three defendants, and there are circumstances of aggravation. I think it is under Rule 41 [*sic*] that the crime involves great violence, other acts of cruelty and viciousness. [¶] He has been adjudged in the juvenile court on three different petitions for criminal acts; those petitions having been found to be true. One did include a serious robbery crime that was at least he was sentenced as a

misdemeanor in that case. And I don't find any circumstances of mitigation. [¶] The court finds that this case, I think, is very serious. I think the evidence is quite clear, even from the testimony of one from somebody that they think they run the whole city of El Monte." The court then sentenced appellant to the aggravated terms.

A trial court is vested with wide discretion in sentencing. (*People v. Scott* (1994) 9 Cal.4th 331, 349.) A trial court's sentence is to be upheld absent a clear showing of abuse of discretion. (*People v. Giminez* (1975) 14 Cal.3d 68, 72.) "[T]he term judicial discretion 'implies absence of arbitrary determination, capricious disposition or whimsical thinking.'" (*Ibid*.) "'"When the question on appeal is whether the trial court has abused its discretion, the showing is insufficient if it presents facts which merely afford an opportunity for a difference of opinion."'" (*People v. Sword* (1994) 29 Cal.App.4th 614, 626.) It has been held that only one factor in aggravation need be named in order to justify imposing the upper term, and that the balancing is not a quantitative exercise, but a qualitative one. (*People v. Oberreuter* (1988) 204 Cal.App.3d 884, 887.)

We conclude the trial court did not abuse its discretion in sentencing appellant to the aggravated terms. The trial court properly weighed the relevant factors in aggravation and mitigation and complied with the California Rules of Court related to sentencing.[2]

According to appellant's probation report, he was arrested in October 1993 for inhalation of toluene (count 1) and possession of toluene (count 2). In November 1993, appellant was arrested for resisting or obstructing a public officer (count 1). A petition alleging all three offenses was filed in May 1994. The petition was sustained as to the inhalation of toluene and resisting an officer counts. Appellant was sent home on probation. In December 1994, appellant was arrested for grand theft (count 1), receiving stolen property (count 2), and theft of personal property (count 3). A

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[2] All further references to rules are to the California Rules of Court unless otherwise indicated.

petition alleging these offenses was filed in May 1995, and the allegation as to count 3 was sustained. Appellant was again sent home on probation. The current offenses were appellant's first adult arrests.

With respect to the current offenses, the probation officer reported two circumstances in aggravation and none in mitigation. The circumstances in aggravation were that the crime involved great violence and that appellant's prior adjudications as a juvenile were numerous or of increasing seriousness. The probation officer then stated that the mid-base term would be appropriate "[d]ue to the fact that the aggravating circumstances outweigh the mitigating circumstances."

Contrary to the probation officer's recommendation, a finding of two factors in aggravation and none in mitigation does not require imposition of the middle term, but rather justifies selection of the upper term. (Rule 4.420(b).) As stated in the pertinent rule: "[s]election of the upper term is justified only if, after a consideration of all the relevant facts, the circumstances in aggravation outweigh circumstances in mitigation. . . ." (See *People v. Myers* (1983) 148 Cal.App.3d 699, 703.) The finding that the crime did indeed involve great violence was accurate, since the evidence showed that appellant participated in breaking down a door and making threats of great bodily harm to the victims. The probation report supports the finding that appellant's juvenile crimes were of increasing seriousness. Thus, the court properly found the same two factors in aggravation that the probation officer found.

With respect to the absence of factors in mitigation, we first observe that the court considered the probation report and defense counsel's argument, and therefore cannot be said to have failed to consider the factors appellant describes as mitigating. Moreover, "many alleged factors in mitigation are disputable either because they may not be established by the evidence or because they may not be mitigating under the circumstances of a particular case. Where an alleged factor in mitigation is disputable, the court may find an absence of mitigating factors and need not explain the reason for its conclusion. [Citations.]" (*In re Handa* (1985) 166 Cal.App.3d 966, 973 [finding drug use an example of a disputable factor in mitigation].) The circumstances in

mitigation that appellant claims were ignored are disputable. Appellant's juvenile record worked against him as an aggravating factor and not as a mitigating factor, as the probation report noted. As for appellant's completion of probation, both respondent and appellant point out that there is no indication in the record that appellant completed his terms of probation satisfactorily. We note that appellant was arrested for the theft offenses only seven months after the date of the first sustained petition that resulted in probation. Even if appellant had completed probation in a satisfactory manner, the aggravating factors would still outweigh the mitigating factors in this case. And, as previously noted, the weighing of the factors is a qualitative rather than a quantitative process. The court was clearly very concerned about appellant's participation in the violent offenses committed against Yvonne L. and M.R.

With respect to the court's mention of "a serious robbery crime" in appellant's juvenile record, any error the trial court may have committed by thus labeling appellant's prior crime was clearly harmless. "When a trial court has given both proper and improper reasons for a sentence choice, a reviewing court will set aside the sentence only if it is reasonably probable that the trial court would have chosen a lesser sentence had it known that some of its reasons were improper." (*People v. Price* (1991) 1 Cal.4th 324, 492.) Given the court's characterization of the current offenses and its conclusion that there were no mitigating circumstances, we do not believe it is reasonably probable the court would have chosen a lesser sentence even if we were to conclude the court incorrectly labeled the 1994 allegation.

Based upon the record, we cannot say that the trial court's sentencing choice was arbitrary, irrational, or a product of whimsical thinking. (*People v. Giminez*, *supra*, 14 Cal.3d 68, 72.) We conclude there was no abuse of discretion.

***II. Alleged Ineffective Assistance of Counsel***

Appellant complains that his trial counsel stood by silently as the court imposed the upper term on the gang enhancement without any statement of reasons.

A criminal defendant has a state and federal constitutional right to the effective assistance of counsel. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15; *Strickland v. Washington* (1984) 466 U.S. 668, 685-686 (*Strickland*); *People v. Pope* (1979) 23 Cal.3d 412, 422.) When claiming ineffective assistance of counsel, a defendant has the burden of establishing by a preponderance of the evidence that: (1) trial counsel's performance fell below prevailing professional standards of reasonableness; and (2) there is a reasonable probability that but for counsel's unprofessional errors, the outcome of the case would have been different. (*People v. Ledesma* (1987) 43 Cal.3d 171, 216-218.) A reasonable probability is one "'sufficient to undermine confidence in the outcome.'" (*Id*. at p. 218, quoting *Strickland*, *supra*, at p. 694.) A reviewing court need not assess the two factors of the inquiry in order, and if there is an inadequate showing on either factor, that factor need not be addressed. (*Strickland*, *supra*, 466 U.S. at p. 697.) Thus, if the record reveals that appellant suffered no prejudice, we may decide the issue of ineffective assistance of counsel on that basis alone. (*Ibid*.)

We conclude that appellant has suffered no prejudice from his trial counsel's failure to specifically object to the high term for the gang enhancement. Since we have addressed appellant's arguments, appellant has not suffered the waiver of his claims. (See *People v. Scott*, *supra*, 9 Cal.4th at pp. 352-353.) Furthermore, appellant was not prejudiced because it is not reasonably probable appellant would have received a lesser sentence "had the court been required to put its reasoning on the record," as appellant asserts. First, the trial court gave an indication of its reasoning when it expressed its dismay that the El Monte Flores gang members believed they ran the city of El Monte. Also, the court characterized as cruel and vicious the current offenses, which were clearly committed on behalf of the El Monte Flores gang. Given the trial court's assessment of the nature of the offense and the offender, it is not reasonably probable it would have given appellant a lesser sentence on the enhancement if trial counsel had requested the court to be more explicit in its

reasoning. Therefore, appellant's claim of ineffective assistance of counsel is without merit.

**DISPOSITION**

The judgment is affirmed.

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_____, J.
DOI TODD

We concur:

_____, P.J.
BOREN

_____, J.
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